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Paper for the House Committee meeting on 15 January 2010

**Report of the Bills Committee on
Inland Revenue (Amendment) (No. 2) Bill 2009**

Purpose

This paper reports on the deliberations of the Bills Committee on Inland Revenue (Amendment) (No. 2) Bill 2009 (the Bill).

Background

2. At the meeting of the Executive Council on 2 June 2009, the Council advised and the Chief Executive ordered that the Bill should be introduced into the Legislative Council (LegCo). The Bill seeks to improve the operation of the Board of Review, a statutory body constituted under the Inland Revenue Ordinance (Cap. 112) (the Ordinance) to hear tax appeals, and to improve the administration of the Ordinance. In this connection, the Administration proposes in the Bill a number of technical amendments to the Ordinance and consequential amendments to the Tax Reserve Certificates Ordinance (Cap. 289).

The Bill

3. The Bill seeks to amend the Ordinance to -
- (a) improve the operation of the Board of Review;
 - (b) provide for the deduction allowed for interest expenses incurred in the acquisition of prescribed fixed assets and specified machinery or plant;
 - (c) enable the Commissioner of Inland Revenue (the Commissioner) to make a property tax assessment on persons who receive rent on any common parts of any land or building;
 - (d) empower an assessor to make an additional assessment of the tax payable in consequence of a taxpayer's revocation of a claim for deduction of home loan interest after the statutory period;

- (e) extend the period within which a prosecution may be instituted for an offence relating to breach of secrecy;
- (f) enable the Commissioner to refund a taxpayer the balance remaining in the Tax Reserve Certificates (TRCs) accounts without requiring the taxpayer to return the TRCs to the Commissioner; and
- (g) make minor and textual amendments.

The Bills Committee

4. At the House Committee meeting on 26 June 2009, Members agreed to form a Bills Committee to study the Bill. Under the chairmanship of Hon CHAN Kam-lam, the Bills Committee has held four meetings. The membership list of the Bills Committee is at **Appendix I**. The public, including relevant organizations have been invited to give views on the Bill. Subsequently, three accounting firms have provided written submissions to the Bills Committee. A list of the three accounting firms is at **Appendix II**.

Deliberations of the Bills Committee

5. The Bills Committee generally supports the Bill. Deliberations of the Bills Committee are summarized in the ensuing paragraphs.

Operation of the Board of Review

Composition and procedure of the Board of Review (Clause 9)

6. The Bills Committee has noted that the Ordinance currently provides that a member of the Board of Review may continue to handle an ongoing case even if his appointment expires before the completion of the case. However, a person who has ceased to be a member (i.e. a retired member) of the Board of Review is not empowered to handle a case that he has handled previously. If there is a need to further handle the case by the Board of Review under the provisions of the Ordinance, the chairman of the Board of Review may have to nominate other members to handle the case. The new members may need to spend tremendous effort and time to acquaint themselves with the case. To enhance the Board of Review's efficiency, the Administration proposes that a retired member be allowed to handle a case that he has handled before in the following circumstances, and be remunerated for performing such functions:

- (a) when the court remits a case to the Board for re-hearing;

- (b) when the Board has dismissed a case, but later on accepts the appellant's application for re-hearing; and
- (c) when the appellant or the Inland Revenue Department (IRD), dissatisfied with the Board's decision, requests the Board to state a case on a question of law for the opinion of the Court of First Instance.

7. While fully appreciating the Administration's intention to enhance the efficiency of the Board of Review, Hon James TO has expressed concern whether the proposed arrangement would be consistent with that of other review/appeal boards. Hon James TO has requested the Administration to provide examples of the operation of other review/appeal boards to illustrate whether the proposed arrangement is in line with common practice, and to give reasons for the proposed arrangement if it is unique.

8. The Administration has advised that the Accreditation of Academic and Vocational Qualification Ordinance (Cap. 592) and the Accreditation of Academic and Vocational Qualifications (Appeal) Rules (Cap. 592A) allow a retired member of the Appeal Board established under the said Ordinance to continue to hear an appeal in the circumstance described at paragraph 6(b) above. Circumstances described at paragraphs 6(a) and 6(c) above arise from the so-called "case stated procedures". Like the Board of Review, four other appeal boards adopt the case stated procedures and allow retired members to continue to hear an on-going appeal. These four appeal boards are the Telecommunications (Competition Provisions) Appeal Board, Municipal Services Appeals Board, Administrative Appeals Board and Unsolicited Electronic Messages (Enforcement Notices) Appeal Board. However, none of the governing legislations of these four appeal boards have express provisions to allow a retired member to continue to handle a previous case in circumstances described at paragraphs 6(a) and 6(c) above. The Administration has pointed out that there were altogether three applications for these four appeal boards to state a case to the court in the past three years, whereas the Board of Review received 33 such applications in the same period. Therefore, the Administration considers that there is a practical need for the Board of Review to be granted the proposed flexibility in redeploying retired members.

9. Hon James TO has remained concerned about the propriety and fairness of the Administration's proposal to empower a retired member of the Board of Review to handle a case that he has handled before in the three circumstances stated in paragraph 6 above. Both he and Hon Albert HO are concerned whether a retired member is still fit and proper to handle an appeal case. The two Members opine that it would be a fairer arrangement for the rehearing to be handled by new members, as members who have handled the case before would have already formed their views on the case. Hon James TO has requested the Administration to consider imposing a statutory requirement for the Board of Review to obtain the prior consent of both parties, i.e. the appellant and the Commissioner, before allowing a retired member to handle a case he has handled before under all the three circumstances stated in

paragraph 6 above or when the court remits a case to the Board of Review for rehearing.

10. The Administration has advised that under the three circumstances stated in paragraph 6, it is already the current practice of the Board of Review to have the case handled by the original hearing panel as far as possible, as there is a practical need for the hearing panel to be conversant with the case background and previous deliberations. The proposed technical amendment is therefore not intended to create a totally new arrangement, but to provide the Board of Review with the flexibility to deploy a member of the original hearing panel in case he happens to have retired from the Board. Under the current practice, both parties to an appeal can raise concerns on the composition of the hearing panel upon receipt of the hearing notice. While it is the ultimate authority of the Chairman of the Board to decide on the composition of the hearing panel, it is not uncommon for the Chairman to change the membership after taking into account views of either party. As the Chairman is an independent and fair-minded person, it is unlikely that he will deploy a member or former member who is no longer fit and proper to serve on the Board. As a matter of principle, the Administration considers that parties to an appeal should not be given a statutory right to choose a hearing panel and object to members whom they dislike.

Power of Board of Review to correct clerical mistakes and other errors (Clause 11)

11. The Bills Committee has noted the concern of Ernst and Young Tax Services Limited (E&Y) about the Board of Review's power to correct "any error in any decision of the Board arising from any accidental slip or omission" under the proposed section 68A, particularly the clarity of the phrase "accidental slip or omission". E&Y has asked how the proposed section 68A is consistent with the means other tribunals and courts seek to correct errors of similar nature. Hon James TO has expressed similar concern and sought illustration on circumstances of "accidental slip or omission".

12. The Administration has explained that the policy intention as reflected in clause 11 of the Bill is to empower the Board of Review to correct such obvious mistakes so as to truly reflect the substance of the decision without requiring the parties to make a formal appeal. The purpose of the correction of the errors is simply to give effect to the intended decisions of the Board. Therefore, the correction itself would not serve to alter any interest of the parties under the intended decision. The proposed section 68A is modelled on Order 20 rule 11 of the Rules of the High Court (Cap. 4A), Order 20 rule 11 of the Rules of the District Court (Cap. 336H) and rule 30 of the Lands Tribunal Rules (Cap. 17A), which are commonly known as the "slip rule". Under those provisions, a correction may be made by the court/tribunal at any time. The purpose of such "slip rule" is akin to rectification, allowing the court/tribunal to reflect the actual order/decision of the court/tribunal. Case law shows that the error or omission in question must be an error in expressing the manifest intention of the court/tribunal and the rule is not to enable them to have second thoughts. As shown from previous court rulings, examples of "accidental slip or omission" include error in

computation and omission to ask for a certificate for counsel in an application for costs order.

Amendments to improve the administration of the Ordinance

Assessment of property tax (Clause 2)

13. The Bills Committee has noted that the Bill seeks to amend the definition of "owner" in the Ordinance so that a property tax assessment can be raised on owners' incorporation registered under the Building Management Ordinance (Cap. 344) or the person who receives rental income on common parts of a building. Hon James TO has expressed concern about the impact of the proposed amendment on property tax assessments and whether the amended definition of "owner" will be exhaustive, such as covering persons who have no right to the property in question nor authorization from owners to collect rental income on the common parts.

14. The Administration has explained that whilst the Commissioner could raise tax assessment on the owners' incorporation concerned or on all the owners of a building where there is no owners' incorporation under the existing practice, the proposed amendment will provide clarity and avoid unnecessary dispute. The proposed revised definition of "owner" is an inclusive definition and is broad enough to cover persons receiving rental income on common parts of a building, including those mentioned by Hon James TO.

Profits tax (Clause 4)

15. The Bills Committee has noted that under the existing provisions, interest payment on money borrowed to finance capital expenditure incurred in purchasing machinery or plant is deductible from profits tax payable if the expenditure qualifies for depreciation allowance. On the other hand, machinery and plant for research and development, prescribed fixed assets or environmental protection machinery do not qualify for depreciation allowance as they have been allowed a 100% upfront deduction in the year of purchase, and any interest payment on capital expenditure incurred in purchasing such machinery and plant and assets are not deductible from profits tax. The proposed amendment under the Bill seeks to correct the disparity by amending section 16(2)(e)(i) of the Ordinance to allow interest payment on capital expenditure incurred in purchasing machinery and plant for research and development, prescribed fixed assets or environmental protection machinery to be deductible from profits tax. Hon James TO has expressed concern whether a clear definition of "environmental protection machinery" has been provided in the legislation to prevent abuse.

16. The Administration has explained that "environmental protection machinery", as defined in section 16H(1) of the Ordinance, means "any machinery or plant that is specified in Part 1 of Schedule 17" to the Ordinance. For example, Part 1 of Schedule 17 to the Ordinance specifies that one of the environmental protection machinery is low noise construction machinery or plant registered under the Quality

Powered Mechanical Equipment system administered by the Environmental Protection Department.

Salaries tax and tax under personal assessment (Clause 7)

17. The Bills Committee has noted that the proposed amendment to section 26E of the Ordinance aims to plug the loophole that in case a taxpayer withhold claiming the home loan interest deduction for a particular year until the sixth year after, and revoke the claim within six months after the deduction is allowed, IRD may be time-barred to raise an additional assessment for that particular year. Members including Hon CHAN Kam-lam and Hon James TO have enquired about the possible reasons for a taxpayer to revoke the claim. The Administration has advised that one of the possible reasons is the taxpayer's anticipation of claiming more home loan interest deduction for another property of a higher value.

IRD staff breaching secrecy provisions (Clause 14)

18. The Bills Committee has noted that the Administration proposes to extend the period within which a prosecution may be instituted for an offence committed by an IRD staff member in breach of the secrecy provisions of the Ordinance from six months to six years to align with similar provisions under the Business Registration Ordinance (Cap. 310) (BRO). The proposed extension will apply only to offences committed on or after the commencement of the Bill (when enacted). While appreciating the confidentiality and sensitivity of information relating to taxation, Hon James TO has expressed concern about the fairness of the proposed extension and questioned whether IRD has encountered difficulties in instituting prosecutions against staff in breach of the secrecy provisions in the past due to expiry of the six-month period.

19. The Administration has explained that a time limit for prosecution is currently not specified in the secrecy provisions of the Ordinance and a six-month time limit for prosecution is imposed under section 26 of the Magistrates Ordinance (Cap. 227). Given the significance of the secrecy provisions, a six-month prosecution time limit is considered insufficient to enable legal actions against breaches. The Administration has therefore proposed to align the limit with similar provisions under BRO, which are also under the purview of IRD. On past cases of which investigation has been made on whether there is a breach of the secrecy provisions, the Administration has advised that there was only one such case but no legal action has been taken after seeking legal advice.

20. Hon James TO has emphasized that in deciding the time limit for instituting prosecution, a correct balance should be struck between enforcing compliance with the secrecy provisions and litigation fairness, making reference to legislation other than BRO and overseas practices. Hon James TO is concerned whether the proposed six-year prosecution period is commensurate with the severity of the offence in question, and the fairness of such a long prosecution period to the defendants

concerned. He therefore suggests that the prosecution period be extended to, say one or two year instead of six years.

21. In response to Mr TO's concern, the Administration has advised that there is no time limit for prosecution of breaches of secrecy provisions in a number of ordinances, for example, the Official Secrets Ordinance (Cap. 521) and the Securities and Futures Ordinance (Cap. 571). The tax legislations of the United Kingdom, Singapore, Australia and New Zealand also impose a legal duty on staff members to preserve the secrecy of tax information. However, there is no prosecution time limit in such legislations for breaches of secrecy provisions in those countries. The Administration has explained that it has decided to amend the Ordinance to extend the six-month prosecution period for breaches of secrecy provisions in 2002, after considering the advice of the Director of Public Prosecutions. As IRD collects information under both the Ordinance and BRO and the information collected under each ordinance can be used to enforce the laws in the other ordinance, the Administration considers that the level of safeguards against breach of secrecy should be comparable under the two ordinances. However, in view of Mr TO's concern, the Administration accepts that the prosecution period for breach of secrecy provisions under the Ordinance can be extended to two years instead of six years. The proposed Committee Stage amendment (CSA) to Clause 14 provided by the Administration is at **Appendix III**

Committee Stage Amendments

22. The Bills Committee agrees to the Administration's proposed CSA at **Appendix III**. The Bills Committee has noted that Hon James TO may propose CSA to clause 9 of the Bill concerning his request for imposing a statutory requirement for the Board of Review to obtain the prior consent of both parties before allowing a retired member to handle a case he has handle before (paragraph 9 refers). The Bills Committee has not proposed any CSAs to the Bill.

Recommendation

23. The Bills Committee supports the resumption of the Second Reading debate on the Bill on 27 January 2010.

Advice sought

24. Members are invited to note the Bills Committee's recommendation in paragraph 23.

Bills Committee on Inland Revenue (Amendment) (No. 2) Bill 2009

Membership list

Chairman Hon CHAN Kam-lam, SBS, JP

Members Hon Albert HO Chun-yan
Hon James TO Kun-sun
Hon Tommy CHEUNG Yu-yan, SBS, JP
Hon Ronny TONG Ka-wah, SC
Hon Paul CHAN Mo-po, MH, JP

(Total: 6 Members)

Clerk Ms Rosalind MA

Legal Adviser Mr Kelvin LEE

Date 17 July 2009

《 2009 年稅務(修訂)(第 2 號)條例草案 》委員會
Bills Committee on Inland Revenue (Amendment) (No. 2) Bill 2009

曾向法案委員會提交意見書的 3 間會計師事務所的名單
List of the three accounting firms which have provided written submissions
to the Bills Committee

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|----|-------------|---|
| 1. | 香港會計師公會 | Hong Kong Institute of Certified Public Accountants |
| 2. | 安永稅務及諮詢有限公司 | Ernst & Young Tax Services Limited |
| 3. | 羅兵咸永道會計師事務所 | PricewaterhouseCoopers Limited |

INLAND REVENUE (AMENDMENT) (NO. 2) BILL 2009

COMMITTEE STAGE

Amendments to be moved by the Secretary for Financial
Services and the Treasury

<u>Clause</u>	<u>Amendment Proposed</u>
14(3)	In the proposed section 81(2), by deleting "6 years" and substituting "2 years".